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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1402

HUGH C. WILBOURN,

Petitioner,

versus

STATE OF LOUISIANA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF LOUISIANA

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STATEMENT OF FACTS

On Sunday morning, September 21, 1975, three men were struck and killed by a "hit and run" automobile while fishing along Paris Road in Orleans Parish.

Through their investigation, officers learned the vehicle was a late model, dark in color, automobile. The

vehicle was being driven in the direction of St. Bernard Parish, a suburb of New Orleans, at the time of the incident.

The next day, Monday, September 22, 1975, two St. Bernard Parish deputies received a radio call to check a vehicle parked in the driveway of 513 Norton Avenue, Arabi, Louisiana.

The radio call was the result of an anonymous telephone call to the St. Bernard Sheriff's Office. The substance of the call was that "the car that killed the men on the bridge yesterday is at 513 Norton Drive".

Upon their arrival, the deputies noted a car to be parked in the open-ended carport of the house. They knocked at the front door of the house, but received no response.

No one likewise responded when they knocked on the side door adjacent to the carport, where the vehicle was parked.

The Officers noted the car in question to be a white/over/brown 1974 Ford, license plate number 51B921. It matched the description of the vehicle involved in the fatal accident.

An examination of the front of the vehicle revealed the fenders, grille and hood to be damaged; as well as covered with what then appeared to be bloodstains and human flesh matter.

Portions of decorative grille work, that appeared to have been removed from the grille of the vehicle, were observed in plain view in an open trash can on the side of the house.

Because the officers suspected the vehicle to have been involved in the "hit-and-run" incident, it was determined that the car should be photographed and specimens taken from the exterior of the vehicle to substantiate the officers suspicions as to human blood and human flesh.

The U.S. Weather Service had declared a "hurricane watch" for the evening of September 22, 1975. The weather conditions were cloudy and rain had been forecast.

Fearing that the stains and flesh matter might be washed away if the predicted rain began to fall; and further realizing that the automobile might be driven away if the officers departed the scene; it was decided the vehicle should be impounded. The time was approximately 6:00 p.m.

A tow wagon arrived shortly thereafter and the vehicle was removed to the New Orleans Police Department Garage. Precaution was taken to have the hood area of the vehicle covered with a plastic covering; to avoid any problem should the rain begin to fall during the towing process.

The grille work that had been observed in the trash can was also seized.

Police technicians later removed scrapings from the hood area of the vehicle and found them to be human blood and flesh. The recovered grille work was matched to the vehicle's damaged drille.

At no time was the car's interior or trunk searched. Photographs of the vehicle were taken and the vehicle was later released by the police.

REASONS FOR DENYING THE WRIT

1. Search And Seizure Of Vehicle

Petitioner contends the warrantless search and seizure of said vehicle violates the U.S. and Louisiana guarantees against unreasonable searches and seizures.

Respondent submits that under both federal and state jurisprudence there is no basis for such contention by defendant.

The police received an anonymous telephone call concerning the presence of the vehicle at the Norton Street address. They immediately proceeded to that address to investigate. *Upon their arrival, they could not help but see the vehicle in plain view in the driveway of the house.*

Petitioner contends the officer's visit to the house was an unwarranted invasion upon the privacy rights of the citizens residing at that address. Such is not the case.

The officer's actions stemmed from an anonymous telephone call. They did not set out to arrest anyone and/or seize anything. Their function was merely of an investigatory nature. They had only had a right to proceed to the scene; but they would have been derelict in their duty had they not investigated.

It is not unreasonable for officers to seek interviews with suspects or witnesses or to call upon them at their homes for such purposes, if such inquiries are courteously made and not accompanied with any assertion of a right to enter or search or secure answers. *SCHNECKLOTH v. BUSTAMONTE*, 93 S.Ct. 2041; *STATE v. TORNABENE*, 337 So.2d 214 (La. 1976).

Here the officers set out to investigate and attempt to question the occupants of the house. Upon their arrival, *they found no one to speak with. However, in "plain view" they observed the vehicle in question.* The officers *did not attempt to search the interior or trunk* of the car for incriminating evidence. There was no need to do so because the vehicle itself was the "instrumentality of the crime".

This evidence, along with the pieces of grille in the trash can, was in "plain view". The vehicle was clearly visible from the public street and *no real search of it was ever conducted.* The officers' examination was limited exclusively to the exterior of the vehicle.

In *CARDWELL v. LEWIS*, 94 S.Ct. 2464, *this Honorable Court held that a warrantless "search" of a vehicle was constitutional when said "search" was limited to the removal of paint*

scrapings from the vehicle's exterior and the examination of one of the vehicle's tires.

In *CARDWELL*, the defendant was arrested for murder. Incidental to that arrest, his automobile keys and a parking lot stub were removed from his pocket. The police then sent a tow wagon to the parking lot and had the car impounded at the police garage. It should be noted that defendant was arrested at police headquarters, several blocks from the parking lot.

The next day, a police technician removed exterior paint samples from the vehicle and examined one of the vehicle's tires. It was determined that the tire matched tire casts made at the murder scene and the paint scrapings were matched to the victim's car. (The victim's car had been pushed over a cliff by another vehicle).

The following is pertinent language from *CARDWELL*:

> *This case is factually different from prior car search cases decided by this Court. The evidence with which we are concerned is not the product of a "search" that implicates traditional considerations of the owner's privacy interest. It consisted of paint scrapings from the exterior and an observation of the tread of a tire on an operative wheel. The issue, therefore, is whether the examination of an automobile's exterior upon probable cause invades a right to privacy which the interposition of a warrant re-*

quirement is meant to protect. This is an issue this Court has not previously addressed. (Emphasis Added)

At least since *CARROL v. UNITED STATES*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *the Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles, on the one hand, and the search of a home or office, on the other.* Generally, less stringent warrant requirements have been applied to vehicles. In *CHAMBERS v. MARONEY*, 399 U.S. 42, 49, 90 S.Ct. 1975, 1980, 26 L.Ed. 2d 419 (1970), the Court chronicled the development of car searches and seizures. An underlying factor in the Carrol Chambers line of decisions has been the exigent circumstances that exist in connection with movable vehicles. "[T]he circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable". *CHAMBERS v. MARONEY*, 399 U.S., at 50-51, 90 S.Ct., at 1981. This is strikingly true where the automobile's owner is alerted to police intentions and, as a consequence, the motivation to remove evidence from official grasp is heightened.

There is still another distinguishing factor. *"The search of an automobile is far less intrusive on the*

rights protected by the Fourth Amendment than the search of one's person or of a building". ALMEILA [sic]-*SANCHEZ v. UNITED STATES,* 413 U.S. 266, 279, 93 S.Ct. 2535, 2542, 37 L.Ed.2d 596 (1973) (Powell, J., concurring). *One has a lesser expectation of privacy in a motor vehicle* because its function is transportation and it seldom serves as one's residence or as the respository of personal effects. *A car has little capacity for escaping public scrutiny.* It travels public thoroughfares where its occupants and its contents are in plain view. See *PEOPLE v. CASE,* 200 Mich. 379, 388-389, 190 N.W. 289, 292 (1922). *"What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection". KATZ v. UNITED STATES,* 389 U.S., at 351, 88 S.Ct., at 511; *UNITED STATES v. DIONISIO,* 410 U.S., at 14, 93 S.Ct., at 771. This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not of course, waive one's right to be free of unreasonable government intrusion. But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry. (Emphasis Added)

In the present case, nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or

seized and introduced in evidence. With the "search" limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, *we fail to comprehend what expectation of privacy was infringed. Stated simply, the invasion of privacy, "if it can be said to exist, is abstract and theoretical". Air Pollution Variance Board v. Western Alfalfa Corp.,* 416 U.S. 861, 865, 94 S.Ct. 2114, 2116, 40 L.Ed.2d (1974). Under circumstances such as these, where probable cause exist, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments. (Emphasis Added)

Here, it has been established and is conceded that the police had probable cause to search Lewis' car. An automobile similar in color and model to his car had been seen leaving the scene of the crime. This similarity was corroborated by comparison of the paint scrapings taken from the victim's car with the color and paint of Lewis' automobile. Lewis had had repair work done on his car immediately following the death of the victim. And he had a nexus with Radcliffe on the day of his death. All this provided reason to believe that the car was used in the commission of the crime for which Lewis was arrested. *COOPER v. CALIFORNIA,* 386 U.S. 58, 61, 87 S.Ct. 788, 790, 17 L.Ed.2d 730 (1967). (Emphasis Added)

Concluding, as we have, that the examination of the exterior of the vehicle upon probable cause was reasonable, we have yet to determine whether the prior impoundment of the automobile rendered that examination a violation of the Fourth and Fourteenth Amendments. We do not think that, because the police impounded the car prior to the examination, which they could have made on the spot, there is a constitutional barrier to the use of the evidence obtained thereby. Under the circumstances of this case, the seizure itself was not unreasonable. (Emphasis Added)

Respondent contends that here, unlike *CHAMBERS*, probable cause to search the car existed for some time prior to arrest and that, therefore, there were no exigent circumstances. Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. Cf. *CHAMBERS*, id., at 50-51, 90 S.Ct., at 1980-1981. The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.

In the instant case, the officers had a right to go to the Norton Street address. See *TORNABENE*, supra.

They brought no warrants to search or arrest simply because they had no idea of whom and/or what they would discover upon their arrival.

They discovered what they believed to be the vehicle involved in the fatal hit and run accident.

The vehicle they observed matched the description of the hit and run vehicle provided by witnesses to the accident.

The condition of the grille work and the discarded pieces of plastic grille that were abandoned in a garbage can; in addition to the presence of human blood and flesh matter on the front exterior of the car, only added to the reasonable belief that this was in fact the vehicle that had struck and killed three persons a day earlier.

Additionally, the officers were aware of the telephone caller's report that this was the vehicle involved in the accident; as well as the fact that the vehicle was located the day after the accident, in St. Bernard Parish, the direction in which the vehicle was traveling at the time of the accident.

Probable cause clearly existed for the officers to search the car.

Likewise, there were exigent circumstances existing at the time the officers observed the vehicle.

The impending weather conditions justified a belief that if the vehicle remained on the carport the rains would wash away the blood and human flesh matter contained on the exterior of the car. As one officer testified during the motion to suppress hearing, "it appeared as if the heavens were going to open".

The officers' decision to immediately impound the vehicle was based also on the official National Weather Service "hurricane watch" that was in effect at the time. Evidence that they acted in good faith was the fact that they went to great length to cover the hood and front portion of the vehicle's exterior so as to prevent any problems should the precipitation have begun while the vehicle was enroute to the police garage.

The existence of probable cause coupled with exigent circumstances is one of the well delineated exceptions to the warrant requirement of the Fourth Amendment. *STATE v. LAIN*, 347 So.2d 167 (La. 1977); *STATE v. HEARN*, 340 So.2d 1365 (La. 1976).

> *In LAIN, it was pointed out that if there is a reasonable basis for moving a vehicle from the place where it was initially stopped, and at the time of the stop the police had the legal right to search where the police eventually searched, and a relatively short time elapses between the decision to move the vehicle to a safer location and the ultimate search, then the search is constitutional;*

citing *CHAMBERS v. MARONEY*, 90 S.Ct. 1975, 1981 (1970) and *STATE v. THOMAS*, 310 So.2d 517 (La. 1975).

The language is *LAIN* is similar to that of this Honorable Court in *CARDWELL v. LEWIS*, supra, concerning what effect, if any, a decision by the police to move a vehicle from the place where it is parked has on their right to conduct a warrantless search of the vehicle after it has been moved. In *CARDWELL*, there was probable cause to conduct a limited "search" of the exterior of the vehicle at the parking lot where it was first located. That limited right to search "accompanied" the vehicle as it was towed away and "was still present" when the vehicle arrived at the police garage.

That exact fact situation is present in the instant case.

There clearly was a prior justification for the officers going to the defendant's home. They had a duty to investigate the possibility that a vehicle, and perhaps its driver, responsible for the deaths of three men the day before, could be found at 513 Norton Avenue. *SCHECKLOTH; TORNABENE*, supra.

They unsuccessfully attempted to ascertain if anyone was inside the house, by knocking first at the front door and then at the door on the side of the carport. It was at this point that they noticed the condition of the hood and grille area of the vehicle, as well as the pieces of grille that had been abandoned in the open garbage can.

The police officers initial effort to speak to someone in the house was perfectly legal.

Although a police officer may not arrest upon mere suspicion, HENRY v. UNITED STATES, 361 U.S. 98 (1959), *or for "investigation", BENNETT v. UNITED STATES,* 104 F.2d 209 (D.C. Cir. 1939), *he has a duty to approach, LEE v. UNITED STATES,* 221 F.2d 29 (D.C. Cir. 1974), *confront and interrogate (which may include the power to temporarily detain). It is the most useful, most efficient, and most effective method of investigation. Often it develops probable cause, KEININGHAM v. UNITED STATES,* 307 F.2d 632 (D.C. Cir. 1962), as to the warrantless seizure of the vehicle itself.

Additionally, special emphasis must be placed on the limited seizure of evidence from the exterior of the car. As in CARDWELL, supra, this evidence was not the product of a "search" that implicates traditional considerations of the owner's privacy interest. (Emphasis Added)

Neither the initial intrusion onto petitioner's property nor the subsequent seizure and limited search of the vehicle violated any reasonable expectation of privacy on petitioner's part that is constitutionally protected.

As the Louisiana Supreme Court noted in affirming petitioner's conviction:

> However, it is a particular individual's right to privacy, not a particular place, which is protected by the constitution. Thus, it is appropriate to take into consideration the particular facts and circumstances, the total atmosphere of the case, in determining whether the constitutional right to privacy has been violated by an unauthorized entry into a part of the premises which is open to the public. *STATE v. NINE,* cited above, 315 So.2d 671.
>
> Under the particular circumstances of this case, we do not find that either the accused's subjective expectation of privacy, or else what society would consider a reasonable expectation of privacy, were offended by the police officers' entry into the unenclosed carport to look at the front of the vehicle, which had been reported (although by a tip of unverified reliability) as having been involved in a hit and run accident the day before. The carport was

on the side of the house, not enclosed from the street, and only partially enclosed on one side.

Persons entering the side-door of the house, or those knocking at the side-door to find out if someone was home or to deliver or sell something, could readily view the front of the vehicle parked alongside. That sort of entry into this carport by members of the public (including police officers on an investigatory mission) is deemed to have been reasonably within the contemplation of the accused, when he left property in the semi-public premise available for public view.

We therefore find no unconstitutional invasion of the accused's right to privacy resulted when the police officers entered this particular carport to look at the vehicle, and no unconstitutional taint in their recording the information they observed there.

Nevertheless, a further troublesome issue is raised by the accused. A couple hours after the first visit, the vehicle was seized by officers and removed to the police laboratory, still without the officers having obtained a warrant and judicial authority to do so. The accused contends, with considerable force, that, at least, the results of the laboratory testing consequent to this warrantless seizure should be suppressed.

> The laboratory testing was limited to findings based on the examination of the exterior of the vehicle. Cf. *CARDWELL* v. *LEWIS*, 417 U.S. 588, 94 S.Ct. 2464 (1978). We are not faced with a warrantless search of the interior or trunk of the car, following a warrantless seizure. If we were, our conclusion might well be different . . . . 356 So.2d 995, at p. 996.

2. The Jury Selection Process

In *STATE v. HOFFMAN*, 345 So.2d 1 (La. 1977), the Louisiana Supreme Court refused to apply retroactively its ruling concerning the invalidity of the method of selecting jury panels in the Orleans Parish Criminal District Court.

The Court determined that "the interests of the administration of justice would best be served by giving this decision prospective application only to those cases wherein a jury panel is selected after this opinion becomes final except those cases which have already been submitted — for decision".

The determinative factor in giving retroactive application to a new rule of law is whether the rule goes to the integrity of the fact-finding process. *WILLIAMS v. UNITED STATES*, 91 S.Ct. 1148 (1971).

Here the Louisiana Supreme Court correctly determined that the *"HOFFMAN* rule" did not go to the integrity of the fact-finding process and refused to apply it retroactively.

CONCLUSION

For these reasons, the petition for a Writ of Certiorari should be denied by this Honorable Court.

Respectfully Submitted,

Dennis J. Waldron
Assistant District Attorney
Orleans Parish
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CERTIFICATE

I hereby certify that three copies of the above and foregoing have been served on Bruce C. Ashley, II, Esq., 6725 St. Claude Avenue, Suite 102, Arabi, LA 70032, by U.S. Mail, postage prepaid, this ____ day of May, 1979.

Dennis J. Waldron